

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re LUIS G., a Person Coming
Under the Juvenile Court Law.

B292641
(Los Angeles County
Super. Ct. No.
18CCJP04258)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

A.G.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of the County of Los Angeles, D. Brett Bianco, Judge. Affirmed in part, reversed in part.

Michelle E. Butler, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

The juvenile court sustained a Welfare and Institutions Code¹ section 300 petition under subdivisions (b)(1) and (j), finding that Luis G. (the child) was at risk of harm due to father A.G.'s substance abuse and history of domestic violence. On appeal, father contends that there was insufficient evidence to support the juvenile court's jurisdictional findings related to his conduct, but does not challenge the additional jurisdictional findings related to mother's conduct. He also challenges the juvenile court's disposition order, requesting placement of the child with him, or in the alternative, reversal of the finding that it would be detrimental to the child's safety, protection, or physical and emotional well-being to place the child with father. We agree that there was insufficient evidence to support the jurisdictional findings as to father's conduct. We conclude that father forfeited any challenge to the disposition order's placement of the child, but determine the detriment finding is unsupported. We will therefore reverse in part the juvenile court's jurisdiction and disposition order.

¹ All further statutory references are to the Welfare and Institutions Code.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Referral and Amended Section 300 Petition*

The child (who was then 13 years old) and his two siblings came to the attention of the Los Angeles County Department of Children and Family Services (the Department) based on allegations of domestic violence between the child's mother and her partner (stepfather), as well as drug use by mother. The Department had not made contact with father at the time it prepared its initial July 9, 2018, detention report. At the time of the detention report, stepfather had custody of the two siblings and the Department had placed the child in foster care, pursuant to a removal order.

On August 21, 2018, the Department submitted a last minute information report to the court, which stated that a social worker had conducted a telephone interview of father, who lived in Arizona. Father told the social worker that he did not know anything about the allegations then pending in the petition. According to father, he was in the child's life "for the first year, then [mother] met someone new, and ran away with him. I tried looking for them. She wouldn't answer my calls. I would go to her relative's homes, and they knew nothing."

Father denied past or present substance use or abuse but admitted that "he was arrested for driving under the influence of alcohol [(DUI)], about 3-4 years ago." Father further stated that he and a former girlfriend Virginia C. shared custody, pursuant to a Family Law Order, of the two children they had in common. He was married to Cierra L.

On August 23, 2018, father made his first appearance on this matter. The juvenile court found father to be the presumed father of the child. Father's counsel made the following statement at the hearing: "He would at some point be requesting that minor be released to him. I don't know if it would be a good idea to put things in place if the Department needs—he is married. But he did indicate to me that he has two extra rooms. He's more than happy to have [the child] back in his life. At the time being, mother has been out of his life a number of years. [¶] So I would like to get the ball rolling so father could have [the child] potentially placed with him meanwhile. Father indicated to me paternal grandmother is also a potential placement for [the child]. Submitted, your honor."

The child's counsel noted that father had not been in the child's life since the child was nine months old, the child had no relationship with father, and the father was essentially a "stranger that's walked into his life and is asking for placement out of state." The child's counsel submitted that placement with father was not in the child's best interest and requested conjoint therapy before visitation began.

The juvenile court ordered that the Department interview and include in its next report any recommendation for possible placement with father or the paternal grandmother. The juvenile court further ordered that the Department consider the propriety of phased-in visitation between the child and father, to begin with conjoint therapy. The juvenile court continued the jurisdiction and disposition hearing to September 10, 2018.

On September 5, 2018, the Department filed a first amended petition, adding among others, count b-3, which alleged that father had a history of substance abuse, including alcohol

abuse, and a criminal DUI conviction, which endangered the child's physical safety and emotional well-being and placed the child at risk of physical and emotional harm and damage. The amended petition also added as count j-1, an allegation that father and his "female companion, Virginia [C.]," have a history of engaging in domestic violence in the presence of the child's half-sibling, which endangered the child's physical health and safety, created a detrimental home environment, placed the child at risk of serious physical harm, damage, and danger, and constituted a failure to protect.

In support of these allegations, on September 10, 2018, the Department submitted a last minute information report. On August 27, 2018, a social worker had interviewed father, who stated that he wanted the child to come and live with him, presumably in Arizona. On August 31, 2018, father stated regarding his DUI arrest that proceedings were pending and that father was supposed to have a breathalyzer installed in his car, but had not been able to do so because of his immigration status. Father denied a history of domestic violence with Virginia C., but admitted that a restraining order had previously been issued against him for Virginia C.'s protection.

On August 29, 2018, a social worker interviewed Virginia C. She stated that she and father separated seven years ago due to father's physical and emotional abuse. Father had pushed her, slapped her, and punched her in the arms, shoulders, legs, and nose, causing marks and bruises. Police had been called to their home on numerous occasions but father was never arrested. Virginia C. obtained a one-year restraining order, protecting her from father. Virginia C. further reported that the domestic violence took place in the presence of the child's half-

sibling. Father was not abusive toward the children and father had recently begun visiting the children frequently, although there was no formal custody arrangement in place. Virginia C. had no information about father's substance abuse or criminal history.

The child told the social worker that he was “not interested” in residing with father or the paternal grandparents as he had no relationship with any of them.

B. *Jurisdiction and Disposition Hearing*

On September 10, 2018, the juvenile court conducted a jurisdiction hearing. Father denied the allegations and asked that they be dismissed. Mother and stepfather had previously denied the allegations that pertained to their conduct. The juvenile court sustained counts b-3 and j-1, and also sustained counts alleging that mother and stepfather had a history of engaging in domestic violence, which placed the children at risk of serious physical harm, damage, and danger, and that mother's substance abuse endangered the children's health and safety and placed them at risk of serious physical harm, damage, and danger, and constituted a failure to protect.

The juvenile court then proceeded with the disposition hearing. Father's counsel stated: “While my client would like for [the child] to be placed with him today, he would be submitting as to placement. But he would like to continue to work his way toward having [the child] placed with him.” Father's counsel also noted that father had telephonic contact with the child “almost every day since the last court date,” and thus “[t]oday, we're requesting and asking the court and we're also asking the

Department to work with father and [the child] and his foster parents to create a visitation schedule for him.”

The juvenile court ordered that the child remain in foster care, permitted monitored visitation with father, and permitted the Department to liberalize visitation. The juvenile court then issued a minute order in which it stated, among other things, that the court found “by clear and convincing evidence . . . [¶] . . . [¶] . . . that it would be detrimental to the safety, protection, or physical or emotional well-being . . . of the child to be returned to or placed in the home or the care, custody, and control of . . . [the] parent(s).”

On September 13, 2018, father timely filed a notice of appeal. Mother has not filed a notice of appeal.

III. DISCUSSION

A. *We Exercise Discretion to Review Jurisdictional Findings*

Father contends that there was insufficient evidence to support the juvenile court’s exercise of jurisdiction over the children based on the allegations regarding his conduct. “When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court’s jurisdiction, a reviewing court can affirm the juvenile court’s finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence.” (*In re I.J.* (2013) 56 Cal.4th 766, 773.) Because mother has not appealed from the court’s jurisdictional findings and father does not contest the validity of those findings, we could affirm the juvenile court’s jurisdiction over the child

regardless of our views of the juvenile court's sustaining of counts b-3 and j-1.

Some courts, however, have nevertheless exercised their jurisdiction over a dependent child when the challenged finding “(1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) ‘could have other consequences for [the appellant] beyond jurisdiction’ [citation].” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.)

Courts have engaged in such review where “the outcome of [the] appeal [was] the difference between father’s being an ‘offending’ parent versus a ‘non-offending’ parent,” which could “have far-reaching implications with respect to future dependency proceedings . . . and father’s parental rights.” (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 763; see also *In re Andrew S.* (2016) 2 Cal.App.5th 536, 542, fn. 2; *In re Quentin H.* (2014) 230 Cal.App.4th 608, 613; *In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1316-1317.)

Here, father asks that we review jurisdictional findings that render him an “offending parent.” We agree that based on these facts, we should exercise our discretion to consider the merits of father’s appeal.

B. *No Substantial Evidence Supports Jurisdictional Finding as to Father*

In conducting a review for substantial evidence, “[w]e do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Rather, we draw all reasonable

inferences in support of the findings, consider the record most favorably to the juvenile court's order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion." (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) "While evidence of past conduct may be probative of current conditions, the question under section 300 is whether [the] circumstances *at the time of the hearing* subject the minor to the defined risk of harm." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824, abrogated on other grounds by *In re R.T.* (2017) 3 Cal.5th 622, 629.)

We begin with count b-3, which alleged that the child was subject to the jurisdiction of the juvenile court based on father's purported substance abuse. Jurisdiction under section 300, subdivision (b)(1), is appropriate where "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure . . . of his or her parent . . . to adequately supervise or protect the child" (§ 300, subd. (b)(1).) The only evidence regarding count b-3 was father's own statement that three or four years earlier, he had been arrested for driving under the influence of alcohol, and the charges remained pending because father had been unable to install a breathalyzer in his car. But there was no evidence father was abusing (or even using) alcohol at the time of the jurisdiction hearing. To the contrary, father denied abusing alcohol and no other witness testified about any purported abuse by father. Virginia C. stated she did not have any information about father's substance abuse. Moreover, the Department did not present any details regarding father's pending case in the form of conviction documents, a criminal history report, or otherwise. Thus, there was no evidence of a nexus between

father's pending DUI charges and the care of the child. The burden was on the Department to demonstrate a substantial risk of harm to the child from father's alcohol use. To uphold the jurisdictional finding here would mean that any child whose parent had pending DUI charges would be subject to dependency proceedings. There was insufficient evidence to support count b-3.

Next, we turn to count j-1, which alleged that father's commission of domestic violence against his former girlfriend, in the presence of the child's half-sibling, placed the child at risk of abuse or neglect. Under section 300, subdivision (j), a child is within the jurisdiction of the juvenile court if (1) the child's sibling has been abused or neglected and (2) there is a substantial risk that the child will be abused or neglected. In determining substantial risk under subdivision (j), a juvenile court must consider the following factors: "the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child." (*In re I.J.*, *supra*, 56 Cal.4th at p. 774.) Subdivision (j) allows a juvenile court to take into consideration factors that might not be determinative if the court were adjudicating a petition filed directly under one of the other subdivisions. (*Ibid.*)

"The broad language of [section 300,] subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in [section 300,]

subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance.” (*In re I.J.*, *supra*, 56 Cal.4th at p. 774.)

We will assume, without deciding, that there was substantial evidence to support a finding that father’s abuse of Virginia C. in the presence of the child’s half-sibling constituted neglect or abuse² of the sibling. Even so, there was no evidence that as a consequence the child was at a similar risk of abuse or neglect because, among other things, father had been separated from Virginia C. for seven years, had since married Cierra L., and there was no allegation of violence between father and Cierra L. or current violence between father and Virginia C. We thus conclude that Virginia C.’s statement that father had abused her seven years ago was insufficient to demonstrate that the child was currently at risk of abuse or neglect, as alleged in count j-1. (See, e.g., *In re Daisy H.* (2011) 192 Cal.App.4th 713, 717 [physical violence between parents that occurred at least two but probably seven years earlier, where there was no evidence any of the children were physically exposed to past violence and no evidence of ongoing violence between the parents who were now separated, was insufficient to support exercise of jurisdiction under § 300, subd. (b)(1)].) We thus reverse the juvenile court’s jurisdictional findings that were based on allegations b-3 and j-1.

² There was no evidence that the half-sibling had been abused as Virginia C. stated that father had not abused the children.

C. *Father's Challenge to Disposition Order*

We review a juvenile court's dispositional findings for substantial evidence. (*In re T.V.* (2013) 217 Cal.App.4th 126, 136.) A juvenile court's disposition order may not be reversed absent a clear abuse of discretion. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006.)

Father contends that the juvenile court erred in failing to place the child in father's custody and thus we must remand the cause for a new dispositional hearing on the issue of placement under section 361.2, subdivision (a). We disagree.

“When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.” (*In re Abram L.* (2013) 219 Cal.App.4th 452, 460-461.) “It is the noncustodial parent's request for custody that triggers application of section 361.2, subdivision (a); where the noncustodial parent makes no such request, the statute is not applicable. (*In re V.F.* (2007) 157 Cal.App.4th 962, 971 . . .; *R.S. v, Superior Court* (2007) 154 Cal.App.4th 1262, 1271)” (*In re A.A.* (2012) 203 Cal.App.4th 597, 605.)

We disagree with father's contention that he “unequivocally requested placement” of the child with him. While father previously told a social worker that he wished to have the child

live with him in Arizona, at the disposition hearing, father clarified that it was his desire to have the child placed with him some time in the future and requested that the juvenile court, the Department, and the foster parents assist with visitation. Father's request was a reasonable one since he had not seen the 13-year-old child since the child was nine months old and had no relationship with him. But "[b]y failing to request custody, [father] forfeited the right to be considered for placement as a noncustodial parent." (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 606.)

Father, anticipating that this court may "interpret[his] submission on the issue of placement as a withdrawal of his request for placement at disposition," alternatively "requests that the [c]ourt simply reverse the detriment finding." We agree such a reversal is appropriate. For the same reasons we conclude there was insufficient evidence to find, by a preponderance of the evidence, that father's purported substance abuse or history of domestic violence supported the exercise of jurisdiction over the child, we conclude that clear and convincing evidence did not support a finding that it would be detrimental to place the child with father. Thus, while we do not remand for a dispositional hearing, we will order the detriment finding be stricken from the juvenile court's disposition order.

IV. DISPOSITION

The judgment is reversed in part and the juvenile court is directed to strike the jurisdictional finding that pertains to father A.G.'s conduct (counts b-3 and j-1), and the dispositional finding that it would be detrimental to the safety and protection of the child to be placed in father's custody. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.